

by the Act, 47 U.S.C. § 206, and Beehive did not seek the recovery of damages for which Sprint may be liable under the Act. *See id.* § 207.

Before the Commission, a carrier is subject to “liability to the complainant only for the particular violation of law ... complained of.” 47 U.S.C. § 208(a). Beehive’s informal complaint specifically alleged that Sprint Nextel’s refusal to pay Beehive’s tariffed access charges based solely on an unadjudicated allegation of access stimulation was an unreasonable self-help practice that violated § 201(b) of the Act. Had the Commission declared that Sprint Nextel had violated § 201(b), Beehive could have elected to seek redress for that wrong by filing a formal complaint with the Commission for “the full amount of damages sustained in consequence” of Sprint Nextel’s violation of § 201(b). *Id.* § 206. The full amount of the damages due from Sprint Nextel would be independent of the \$929,626 in access charges owed by Sprint.

Had it successfully pursued its claim for damages against Sprint Nextel for its violation of § 201(b), Beehive would have been entitled at least to damages measured at its “opportunity costs awaiting payments of amounts due to it.” *MGC Communications, Inc. v. AT&T Corp.*, 15 FCC Rcd 308, 312 (1999). Thus, Beehive could have sought compensatory damages for being deprived of the beneficial use of the funds during the period that Sprint Nextel unlawfully refused to pay access charges. *See Western Union Telegraph Co.*, 10 FCC Rcd 1741, 1748 (1995); *MCI Telecommunications Corp. v. The Pacific Bell Telephone Co.*, 8 FCC Rcd 1517, 1530 (1993).

Even if it had prevailed on a damages claim against Sprint Nextel before the Commission, Beehive still would have had to bring suit in the Court to collect its unpaid NECA 5 access charges from Sprint. For as we have conclusively shown, the Commission will not

entertain a complaint for unpaid tariffed access charges. Clearly, therefore, Beehive's informal complaint against Sprint Nextel and its suit against Sprint represented jurisdictionally-distinct causes of actions for different remedies.

B. Beehive Raised Different Issues

The fact that Beehive's informal complaint to the Commission arose from Sprint Nextel's decision not to pay any of Beehive's access charges did not bar Beehive from subsequently bringing any claim in district court that had any nexus to that decision. *See Premiere*, 440 F.3d at 689; *Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187, 191 (2d Cir. 2001). At the most, the election-of-remedies provision of § 207 would have barred Beehive from filing "a complaint on the same issues in the alternative forum." *Premiere*, 440 F.3d at 688. But Beehive did not place the same issues before the Commission and the Court.

Sprint Nextel's conduct was at issue before the Commission in the informal complaint proceeding. Beehive alleged that Sprint Nextel had no grounds under the Act or the Commission's rules to withhold payment of Beehive's NECA 5 charges.⁴⁹ Moreover, Beehive charged that Sprint Nextel decided to employ self-help with notice that an allegation of access stimulation was not a basis for questioning the legitimacy of the traffic.⁵⁰ Beehive alleged that Sprint Nextel acted unreasonably under the circumstances, and therefore violated § 201(b) of the Act, by withholding payment of Beehive's tariffed access charges.⁵¹ The issues that Beehive raised not only implicated far-reaching Commission policies,⁵² but were subject to the

⁴⁹ *See* Informal Compl. at 7.

⁵⁰ *See id.* at 11 (citing *Declaratory Ruling*, 22 FCC Rcd at 11632).

⁵¹ *See id.* at 8.

⁵² Under a long-standing Commission policy, a customer "is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's

Commission's primary jurisdiction. *See Total Telecommunications Services, Inc. v. AT&T Co.*, 919 F. Supp. 472, 480 (D.C.D.C. 1996) (the "FCC has primary jurisdiction over claims that ... practices are not just and reasonable").

In contrast, Sprint Nextel was not a party before the Court and its conduct was not at issue. To collect its access charges, Beehive carried the burden simply to prove that it (1) operated under NECA 5 and (2) provided service to Sprint pursuant to that tariff. *See Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000); *Frontier Communications of Mt. Pulaski, Inc. v. AT&T Corp.*, 957 F. Supp. 170, 175-76 (C.D. Ill. 1997). Thus, the issues that Beehive presented the Court went to whether Beehive provided access service to Sprint as authorized by NECA 5. Beehive's complaint did not put Sprint's conduct or its alleged violation of § 201(b) at issue before the Court.

The declaratory ruling that Beehive sought informally would not have portended applicable tariffed charges and regulations." *Business Watts, Inc. v. AT&T Co.*, 7 FCC Rcd 7942, 7942 (Com. Car. Bur. 1992); *NOS Communications, Inc. v. AT&T Co.*, 7 FCC Rcd 7889, 7889 (Com. Car. Bur. 1992); *Affinity Network Inc. v. AT&T Co.*, 7 FCC Rcd 7885, 7885 (Com. Car. Bur. 1992); *Business Choice Network v. AT&T Co.*, 7 FCC Rcd 7702, 7702 (Com. Car. Bur. 1992). *See MCI Telecommunications Corp.*, 62 F.C.C. 2d 703, 705-06 (1976) ("We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services"). The Commission's policy was reaffirmed when the WCB issued its *Declaratory Ruling* that IXCs should employ the Commission's formal and informal complaint processes to seek relief from alleged access stimulation, and "may not engage in self help actions such as call blocking." 22 FCC Rcd at 11629. The teaching of the *Declaratory Ruling* is that allegations of access stimulation do not provide cause for IXCs to take unilateral action that may ultimately degrade the reliability of the nation's telecommunications network. *See id.* at 11631 n.15 and accompanying text. The ubiquity of the network has already been compromised by Sprint's refusal to pay Beehive's tariffed access rates. Having received no payment on Sprint's account since April 2009, and being owed more than \$3 million in unpaid access charges and penalty interest, Beehive terminated service to Sprint on December 10, 2009 pursuant to § 2.1.8(B) of NECA 5. Beehive anticipates that other LECs will terminate access service to Sprint and the other IXCs that have engaged in a widespread campaign of self-help. *See Open Letter of 20 Telecom CEOs to Julius Genachowski*, WC Docket No. 09-152, at 2 (Sept. 21, 2009).

duplicative litigation and potentially inconsistent results. A Commission ruling that Sprint engaged in an unreasonable self-help practice by withholding payment of tariffed charges without factual or legal justification would have no bearing on the issue before the Court. What the Commission would find unlawful was Sprint's resort to refusing to pay tariffed charges (based on its unilateral determination that a mere allegation of access stimulation warranted self-help), rather than paying the charges and then challenging their lawfulness via a § 208 complaint. *See, e.g., Bell Atlantic-Delaware v. Frontier Communications Services, Inc.*, 15 FCC Rcd 7475, 7479-80 (2000). Whether or not Beehive's charges were ultimately found to be lawful would have been immaterial to the Commission's declaratory ruling. Hence, the ruling could not have posed a potential conflict with the Court's decision on whether Beehive was entitled to collect its unpaid access charges under NECA 5.

VI. THE COMMISSION SHOULD GRANT DECLARATORY RELIEF

The Commission obviously has the authority to issue a declaratory ruling to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. Having definitively held that actions to recover unpaid access charges due under a federal tariff must be brought in federal district court, *see U.S. TelePacific*, 19 FCC Rcd at 24555, the Commission should exercise its discretion to issue a declaratory ruling to remove the uncertainty as to the jurisdictional issue that exists at the Court and may also exist at the Tenth Circuit, which has addressed the issue only in *dicta*.⁵³ A favorable ruling will permit Beehive to refile its complaint against Sprint and to pursue its two collection suits in what the Commission has identified as the "proper forum" for

⁵³ *See Ton Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244-45 (10th Cir. 2007). The Court denied Beehive's request that it enter a final judgment on the dismissal of Beehive's claim under Fed. R. Civ. P. 54(b) so that an appeal could be taken to the Tenth Circuit. *See infra* Attachment 2 at 4-5 (2010 WL 231776, at *2). Accordingly, Beehive will be unable to appeal the Court's decision until a final judgment is entered on Sprint's counterclaims and third party complaint.

such actions. *U.S. TelePacific*, 19 FCC Rcd at 24555. It would be well within the Commission's broad discretion to issue a declaratory that will afford Beehive the opportunity to make its case before the Court. *See Petition for Declaratory Ruling to Clarify Provisions of § 332(C)(7)(b) to Ensure Timely Siting Review*, 24 FCC Rcd 13994, 13995 (2009).

Because the Court's dismissal of Beehive's complaint might result in a § 415(a) statute-of-limitations bar to its right to collect its access charges under NECA 5,⁵⁴ Beehive respectfully requests that the Commission expeditiously issue a declaratory ruling that it will not entertain a complaint by Beehive against Sprint to recover access charges allegedly due under NECA 5. Beehive submits that an abbreviated declaratory ruling should suffice, because its collection suit obviously could not trigger an election-of-forum under § 207 when one of the fora is without jurisdiction to adjudicate Beehive's claim.

The Commission would be warranted in issuing a broader ruling that would remove the uncertainty exhibited by various federal appeals courts regarding the scope of the election-of-remedies provision of § 207. For example, recognizing that the filing of an informal complaint with the Commission "does not bar the complainant from bringing *all* claims, no matter how unrelated in district court," the Second and Fifth Circuits have attempted to ascertain the "nexus between the claims in the two forums that is sufficient to bring § 207 into play." *Premiere*, 440 F.3d at 689; *Digitel*, 239 F.3d at 191. Neither court has been able to precisely identify the "nexus" between the claims that would trigger an election of remedies under § 207. *See Premiere*, 440 F.3d at 691 ("whatever the reach of [§] 207, there is insufficient nexus between the two sets of claims to trigger the section's election of remedies mandate"); *Digitel*, 239 F.3d at 191 ("we need not decide exactly what nature and degree of overlap between administrative

⁵⁴ *See Ton Services*, 493 F.3d at 1244-45.

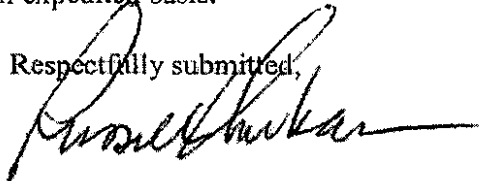
complaints and suits in district court are necessary to trigger § 207's bar").

Federal courts owe deference to the Commission's interpretation of the Act. *See, e.g., Iowa Telecommunications Services, Inc. v. Iowa Utilities Bd.*, 563 F.3d 743, 748 (8th Cir. 2009). Therefore, the Commission could resolve the judicial uncertainty regarding the nexus between claims that is necessary to trigger a § 207 election of remedies by issuing a declaratory ruling that interprets §§ 206-209 of the Act to mean that only a claim for damages caused by a carrier's violation of a provision of the Act can trigger such an election. *See supra* pp. 7-12. It would also aid the federal courts for the Commission to clearly rule that a carrier's failure to pay charges for telecommunications services would give rise to a complaint for damages under §§ 207 or 208(a) only if the failure to pay violates a provision of the Act or a Commission rule, the violation of which also violates the Act. *See Global Crossing*, 550 U.S. at 52-54.

CONCLUSION

For all the foregoing reasons, Beehive respectfully requests that the Commission issue the requested declaratory ruling on an expedited basis.

Respectfully submitted,



Russell D. Lukas
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8660
rlukas@fcclaw.com

*Attorney for Beehive Telephone Co., Inc. and Beehive
Telephone Co. Inc. Nevada*

February 2, 2010

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah
corporation, and BEEHIVE TELEPHONE
CO. OF NEVADA, INC., a Nevada
corporation,

Plaintiffs,

v.

SPRINT COMMUNICATIONS COMPANY,
L.P., a Delaware limited partnership,

Defendant.

**MEMORANDUM OPINION AND
ORDER**

Case No. 2:08-CV-00380

Judge Dee Benson

This matter is before the court on defendant Sprint Communications Company L.P.'s motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss this action for lack of subject matter jurisdiction. (Dkt. No. 25.) A hearing on the motion was held on October 6, 2009. At the hearing, Sprint was represented by Marc A. Goldman and Paul C. Drecksel. Plaintiffs, Beehive Telephone Co., Inc. and Beehive Telephone Co. of Nevada, Inc. (collectively "Beehive") were represented by Alan L. Smith. At the conclusion of the hearing the court announced that it was inclined to grant Sprint's motion. Now, consistent with that preliminary view, and having taken the motion under advisement, the court has further considered the law and facts relating to the motion and renders the following Memorandum Opinion and Order.

Background

Beehive is an incumbent local exchange carrier ("ILEC") as defined by § 251(h)(1) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 251(h)(1). Sprint is a long-distance or interexchange carrier ("IXC") that owns and controls a nationwide network. As a

general matter, Sprint does not own local facilities that physically connect to Sprint's local phone customers in Beehive's service area. Therefore, Sprint purchases "access services" from Beehive to obtain access to local customers. Beginning in October 2007, Sprint began withholding payment from Beehive for access services because Sprint believed Beehive was engaged in traffic pumping schemes with various companies to collect unlawful charges.¹

On March 21, 2008, pursuant to section 1.716 of the Federal Communications Commission's ("FCC") rules, 47 C.F.R. § 1.716, Beehive filed an "informal complaint" at the FCC against Sprint. (See Goldman Decl. in Support of Mot. to Dismiss Ex. 1 at 4.) Beehive requested that the FCC investigate Sprint's practice of refusing to pay Beehive billed access charges as a form of "self help" in connection with its claim that the charges were the product of traffic pumping. (See *id.*) Furthermore, Beehive requested a declaratory ruling from the FCC that Sprint violated §201(b) of the Act and was "obligated to pay Beehive's billed access charges and late payment penalties." (See *id.*)

With Beehive's informal complaint still before the FCC, Beehive filed a complaint in this court seeking damages. In the complaint, Beehive stated that its action was based on Sprint's ongoing refusal to pay Beehive charges for access services used by Sprint's customers. (See Compl. ¶ 6.) Beehive also stated that it was authorized by § 207 of the Act to seek a judgment from this court for the amount due and owing from Sprint. (See Compl. ¶ 17.)

Subsequently, the FCC entertained Beehive's informal complaint, but made no ruling. (See Goldman Decl. in Support of Mot. to Dismiss Ex. 4 at 59.) Instead, the FCC recommended

¹Sprint's alleged "traffic pumping" is essentially a scheme where an ILEC partners with other entities to artificially inflate call traffic in order to increase access service charges.

no further action and notified Beehive that it was permitted to file a formal complaint if unsatisfied by the FCC's disposition of the informal complaint. (*See id.*)

On July 31, 2009, Sprint filed a motion to dismiss claiming that § 207 contains an election of remedies provision which barred Beehive from filing a subsequent claim for relief in this court. Beehive asserts that § 207 does not bar Beehive from proceeding before this court for essentially two reasons.² First, Beehive argues that § 207 only operates as a bar where a party seeks damages before both the FCC and in court. Second, Beehive argues that § 207 does not bar the present action because the FCC lacked jurisdiction to hear Beehive's complaint.

Discussion

The United States Court of Appeals for the Tenth Circuit has recognized that § 207 is a clear "election-of remedies provision." *See TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007). Section 207 provides that:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction, but *such person shall not have the right to pursue both such remedies.*

47 U.S.C. § 207 (emphasis added). This court concurs with the Fifth Circuit in that "the language of the statute is unambiguous: A complainant can file a complaint either with the FCC or in federal district court, but not in both." *See Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th

²Beehive also argued that it did not make an election under § 207 because it named the wrong party in its FCC informal complaint. Beehive named Sprint Nextel Corporation in its informal complaint with the FCC as opposed to the named defendant Sprint Communications Company L.P. Despite the difference in name, the record is clear that the appropriate party received notice of Beehive's FCC complaint and responded with a vigorous defense. It would be form over substance to conclude that by designating Sprint Nextel Corporation instead of Sprint Communications Company Beehive could escape the jurisdictional bar of § 207.

Cir. 1997). Moreover, courts have consistently held that filing an informal complaint at the FCC precludes a party from filing suit in federal court on claims arising from the same issues. See *Premiere Network Servs., Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 687-88 (5th Cir. 2006) (dismissing federal claims under § 207 with issues raised in FCC informal complaint); *Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001) (concluding that a party that has filed an informal complaint with the FCC may not also sue in district court); *Mexiport, Inc. v. Frontier Commc'ns Servs., Inc.*, 253 F.3d 573, 575 (11th Cir. 2001) (holding that appellant could not file in federal court after having filed an informal complaint with the FCC). In the instant case, it is clear that Beehive filed complaints at the FCC and in this court based on the same issues, Sprint's refusal to pay access service charges.

1. Request for Declaratory Relief

Beehive's claim that it did not make an election under § 207 because it only sought declaratory relief in its informal complaint with the FCC is unpersuasive. Beehive offers no judicial precedent in support of this assertion, nor has the court found any. Furthermore, this assertion is inconsistent with the plain meaning of the statute. Statutory interpretation begins with an analysis of the plain language. See *United States v. Saenz-Gomez*, 472 F.3d 791, 793 (10th Cir. 2007) (citing *United States v. Jackson*, 248 F.3d 1028, 1030 (10th Cir. 2001), *cert denied* 534 U.S. 929 (2001)). If the statute's text evinces an unmistakable plain meaning, the analysis ordinarily ends. *Id.* The statutory language of § 207 provides in pertinent part that a person "may either make complaint to the Commission . . . or may bring suit for the recovery of the damages . . . in any district court." 47 U.S.C. § 207. The statute does not require a person to request damages at the FCC, and this court will not read such a requirement into it. If a party could avoid the election of remedies provision in § 207 simply by styling its FCC complaint as one for declaratory

relief, § 207 would be rendered meaningless. Parties could always pursue simultaneous actions at the FCC and in court by styling the FCC action as a declaratory action on the same issues raised in court. In light of the plain meaning of the statute, the court finds Beehive's argument without merit.

2. FCC's Lack of Jurisdiction

Beehive's second argument is that Beehive never made an "election" within the meaning of § 207 because the FCC was without jurisdiction over its complaint. This is a remarkable assertion from a party who repeatedly and categorically argued in its FCC complaint that the FCC possessed jurisdiction to resolve its claim against Sprint. Furthermore, the FCC never ruled on the issue of jurisdiction and actually even suggested that it has jurisdiction when it invited Beehive to file a formal complaint. Regardless, there is nothing in the record to suggest that the FCC determined that it lacked jurisdiction over Beehive's complaint against Sprint. As a result, it would be inappropriate and premature for this court to consider how the FCC's possible lack of jurisdiction over a claim may affect the operation of § 207 in the instant case.

Conclusion

For the foregoing reasons, the court finds that § 207 bars Beehive from proceeding with its claim in this court. Accordingly, Sprint's motion to dismiss is granted.³ Beehive's complaint is dismissed without prejudice, each party to bear its own costs.

IT IS SO ORDERED.

DATED this 13th day of October, 2009.



Dee Benson
United States District Judge

³This order is subject to Beehive's counsel having the right to file a motion for leave to amend complaint asserting an alternative jurisdictional basis by October 21, 2009.

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah
corporation, and BEEHIVE TELEPHONE
CO. OF NEVADA, INC., a Nevada
corporation,

Plaintiffs,

v.

SPRINT COMMUNICATIONS COMPANY,
L.P., a Delaware limited partnership,

Defendant.

ORDER

Case No. 2:08-CV-00380

Judge Dee Benson

The matter presently before the court is plaintiffs Beehive Telephone, Inc. and Beehive Telephone Co. of Nevada, Inc.'s (collectively "Beehive") motion for leave to amend complaint (Dkt. No. 51) and motion to amend, or provide relief from, order of dismissal (Dkt. No. 54). This court granted defendant Sprint Communications Company, L.P.'s ("Sprint") motion to dismiss Beehive's complaint for lack of subject matter jurisdiction on October 13, 2009. On October 21st and 27th, Beehive filed the instant motions.

1. Motion for Leave to Amend Complaint

Beehive has moved the court to add averments to Beehive's complaint to support an "additional ground" for subject-matter jurisdiction, namely diversity jurisdiction.¹ Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be freely given when justice so requires. *See* Fed. R. Civ. P. 15(a)(2). Nevertheless, a district court may

¹The court's October 13, 2009 memorandum opinion and order ("October 13 order") granted Beehive's counsel the right to file a motion for leave to amend complaint asserting an alternative jurisdictional basis. (*See* October 13 order, at 5 n.3.)

refuse to allow amendment if it would be futile. *See Anderson v. Suters*, 499 F.3d 1228, 1238 (10th Cir. 2007). “A proposed amendment is futile if the complaint, as amended, would be subject to dismissal.” *Lind v. Aetna Health, Inc.*, 466 F.3d 1195, 1199 (10th Cir. 2006) (quoting *Bradley v. J.E. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004)). Here, the court’s October 13 order dismissed Beehive’s complaint under § 207 of the Communications Act of 1934 (“Act”) because Beehive filed a complaint at the FCC and then in this court based on the same issues. (See October 13 order, at 4.) The United States Court of Appeals for the Tenth Circuit has recognized that § 207 is a clear “election-of-remedies provision” such that “once an election is made by either filing a complaint with the FCC or filing a complaint in federal court, a party may not thereafter file a complaint on the same issues in the alternative forum.” *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007) (citation omitted). Section 207 is not predicated on the particular jurisdictional grounds a plaintiff asserts. Beehive’s proposed amendments would be futile because asserting diversity jurisdiction would not avoid the court’s dismissal of Beehive’s complaint. Therefore, Beehive’s motion for leave to amend complaint is denied.

2. Motion to Amend, or Provide Relief From, Order of Dismissal

a. Motion to Amend October 13 Order

Beehive’s motion to amend asserts four grounds to alter the court’s October 13 order: (1) section 207 only confers jurisdiction over suits for damages caused by carrier violations of the act; (2) Beehive’s complaint was subject exclusively to the court’s original jurisdiction under 28 U.S.C. §§ 1331 and 1337(a)²; (3) Beehive’s claim for unpaid tariffed charges was not subject to a

²Beehive presents this ground for reconsideration as independent of § 207. However, this argument is actually that § 207 is inapplicable because Beehive’s complaint never invoked § 207. (See Dkt. No. 54-2, at 3-4.) The court finds this argument unpersuasive and untimely. Beehive’s

§ 207 election of remedies; and (4) Beehive did not make duplicative claims or pursue the same remedy before the FCC and this court.

The court construes Beehive's motion to amend as a motion to reconsider. *See In re Unioil, Inc.*, 962 F.2d 988, 994 (10th Cir. 1992) (stating that prior to the entry of a final judgment, the district court retains the discretion to reconsider and revise interlocutory orders). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *see also Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981). Reconsideration "is not appropriate to revisit issues already addressed or advance arguments that could have been raised prior to briefing." *Servants*, 204 F.3d at 1012. Moreover, "[a] motion to reconsider must be made upon grounds other than a mere disagreement with the court's decision." *SCO Group, Inc. v. Novell, Inc.*, No. 2:04-CV-139, 2007 WL 2746953, at *1 (D. Utah Sept. 14, 2007).

Applying these principles, the court finds no bases for altering or amending the October 13 order. As in Beehive's memoranda in opposition to Sprint's motion to dismiss and at the hearing, Beehive's asserted grounds for reconsideration pertain to the applicability of § 207 to Beehive's claim. These grounds relate to issues already addressed by the court and/or contain arguments that should have been raised prior to the court's October 13 order. Therefore, Beehive's motion to amend the court's October 13 order is denied.

informal complaint before the FCC, its instant complaint, and memoranda submitted to the court assert violations of the Act and Sprint's liability under § 207.

b. Motion to Provide Relief From October 13 Order

In the alternative, Beehive asks the court to either: (1) stay its order of dismissal and refer the question of whether the FCC has jurisdiction over Beehive's complaint for its unpaid NECA 5 charges to that agency under the primary jurisdiction doctrine; or (2) direct final entry of a final judgment dismissing Beehive's complaint for lack of subject matter jurisdiction under Rule 54(b) of the Federal Rules of Civil Procedure.

First, the court denies Beehive's request to stay the October 13 order and refer the question of whether the FCC has jurisdiction over Beehive's complaint for its unpaid NECA 5 charges to the FCC. The court recognizes and has rejected Beehive's position that § 207 distinguishes between a declaratory action and a request for damages. The application of § 207 depends on whether Beehive filed complaints at the FCC and in this court based on the same issues, that is, Sprint's refusal to pay access service charges. (*See* October 13 order, at 4.) Thus, the specific question of whether the FCC has jurisdiction over Beehive's instant complaint for unpaid NECA 5 charges is extraneous. Accordingly, the court declines to stay the October 13 order.

Second, the court denies Beehive's request to direct final entry of a final judgment on Beehive's claim. Under Rule 54(b), this court has discretion to enter a final judgment on Beehive's claim dismissed by the October 13 memorandum and order. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1989). Rule 54(b) provides in part:

The court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Fed. R. Civ. P. 54(b). The Tenth Circuit has cautioned that "Rule 54(b) entries are not to be made routinely." *Oklahoma Turnpike Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001)

(citation omitted). District courts "should be reluctant to enter Rule 54(b) orders since the purpose of this rule is a limited one: to provide a recourse for litigants when dismissal of less than all of the claims will create undue hardships." *Gas-A-Car, Inc. v. American Petrofina, Inc.*, 484 F.2d 1102, 1105 (10th Cir. 1973). Here, Beehive has not provided support for a finding that there is no just reason for delay until the court has conclusively ruled on all claims. Thus, the court declines to direct final entry of a final judgment on Beehive's claim.

CONCLUSION

For the foregoing reasons, the court DENIES both Beehive's motion for leave to amend complaint and motion to amend, or provide relief from, order of dismissal.

IT IS SO ORDERED.

DATED this 20th day of January, 2010.



Dee Benson
United States District Judge

CERTIFICATE OF SERVICE

I, Russell D. Lukas, hereby certify that on this 2nd day of February 2010, copies of the foregoing PETITION FOR DECLARATORY RULING were transmitted by e-mail, in pdf format, to the following:

Sharon Gillett, Chief
Wireline Competition Bureau
Sharon.Gillett@fcc.gov

Alex Starr, Chief
Market Disputes Resolution Division
Enforcement Bureau
Alex.Starr@fcc.gov

Michael B. Fingerhut
Sprint Nextel Corporation
michael.b.fingerhut@sprint.com

Marc A. Goldman
Jenner & Block
mgoldman@jenner.com

Best Copy and Printing, Inc.
FCC@BCPIWEB.COM

A handwritten signature in black ink, appearing to read "Russell D. Lukas", written over a horizontal line.

Russell D. Lukas